

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-3692

UNITED STATES OF AMERICA

vs.

DONALD NICHOLAS FETZNER,

Appellant.

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Criminal No. 02-cr-00006E)
District Judge: The Honorable Sean J. McLaughlin

Submitted Under Third Circuit LAR 34.1(a)
June 24, 2004

BEFORE: NYGAARD, McKEE, and CHERTOFF,* Circuit Judges.

* This case was submitted to the panel of Judges Nygaard, McKee, and Chertoff. Judge Chertoff resigned after submission, but before the filing of the opinion. The decision is filed by a quorum of the panel. 28 U.S.C. § 46(d).

(Filed: April 26, 2005)

OPINION OF THE COURT

NYGAARD, Circuit Judge.

This Court, by opinion filed August 11, 2004, affirmed the District Court's judgment of conviction and sentence. On August 13, 2004, this Court vacated the opinion and on October 26, 2004, held the case C.A.V. pending decision by the U.S. Supreme Court in *United States v. Booker*, 543 U.S. ___, 125 S. Ct. 738 (2005).

Appellant David Fetzner pleaded guilty to one count of conspiracy to defraud the United States of income tax revenues in violation of 18 U.S.C. § 371. Now, Fetzner challenges his sentence under *United States v. Booker*, 543 U.S. ___, 125 S. Ct. 738 (2005). We reaffirm all portions of our prior decision with respect to the conviction. However, having determined that the sentencing issues appellant raises are best determined by the District Court in the first instance, we vacate the sentence and remand for resentencing in accordance with *Booker*.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Richard L. Nygaard
Circuit Judge